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No. 88-451

Supreme Court, U.S.
FILED
NOV 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

PETER E. HORRIGAN, PETITIONER

v.

GENERAL DYNAMICS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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Petitioner successfully prosecuted a claim for disability benefits under Section 8(c)(2) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 908(c)(2), but did not succeed on his separate and distinct discrimination claim under Section 49 of the LHWCA, 33 U.S.C. 948a. Petitioner contends that the court of appeals erred in limiting his attorney's fee award to those fees he incurred in litigating the claim upon which he had prevailed.

1. Petitioner worked as a crane operator for General Dynamics Corporation from September 1966 until October 16, 1980, when he injured his left knee and ankle (Pet. App. 2a). General Dynamics paid petitioner temporary total disability benefits from that date until Decem-

ber 13, 1981, when his physician issued a medical certificate indicating that petitioner was able to work without limitation (*id.* at 2a, 13a). Rather than returning to work for General Dynamics, however, petitioner began work as a rigger for a rival shipyard (*id.* at 2a). Three weeks later, after petitioner discovered that he was unable to perform rigger duties because of leg pain, he resigned and returned to General Dynamics (*id.* at 2a, 24a).

Upon his return, petitioner told General Dynamics' medical personnel that he had not returned to work immediately after his medical clearance because he had continued to experience difficulties with his leg (Pet. App. 3a, 24a-25a). He did not inform General Dynamics of his employment with the other shipyard, even though a medical questionnaire that petitioner completed asked whether he had worked since his injury (*id.* at 3a, 24a). Although petitioner anticipated that he would be disqualified from employment with General Dynamics because of his leg problem, he passed a physical examination and was returned to full duty work as a crane operator (*id.* at 2a). Shortly afterwards, General Dynamics discovered that petitioner had worked during December 1981 and had withheld that information (*id.* at 3a, 26a). On February 12, 1982, General Dynamics discharged petitioner for violating company work rules by falsifying the reason for his absence during the period between his medical clearance and reemployment and by withholding information regarding his December 1981 employment (*id.* at 3a, 27a). After his discharge, petitioner remained unemployed because of leg pain, with the exception of a three week period in which he unsuccessfully attempted to work as a rigger (*id.* at 3a).

2. On April 15, 1983, petitioner filed a claim for disability benefits under Section 8(c), 33 U.S.C. 908(c), of the

Longshoremen's and Harbor Workers' Compensation Act,[1] in which he sought benefits as of his discharge from General Dynamics for his disability (Pet. App. 3a). The same day, he filed a separate claim under Section 49 of the LHWCA, 33 U.S.C. 948a, alleging that General Dynamics discriminatorily discharged him because he had filed or threatened to file a disability claim (Pet. App. 3a).

After consolidating the two claims for hearing, an administrative law judge (ALJ) found petitioner permanently partially disabled and entitled to benefits under the LHWCA schedule on that basis (Pet. App. 28a-29a). However, the ALJ found that General Dynamics had not discriminated against petitioner when it discharged him since the sole reason for the discharge had been petitioner's violation of company rules (*id.* at 32a-33a).

When petitioner sought attorney's fees under Section 28(a) of the LHWCA, 33 U.S.C. 928(a), the ALJ determined that petitioner's counsel had reasonably expended 94.25 hours on the two claims (Pet. App. 42a). The ALJ reduced the compensable hours, however, holding that petitioner was not entitled to fees for work on the unsuccessful discrimination claim, which the ALJ noted was "completely devoid of merit" (*id.* at 38a-40a). The ALJ stressed (*id.* at 38a) the separate nature of the claims—one involving "the narrow issue pertaining to the nature and extent of disability," the other involving the allegation "that General Dynamics terminated [petitioner's] employment in 1982 because of his filing a claim for compensation"—and concluded (*id.* at 42a) that he should subtract

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[1] The Longshoremen's and Harbor Workers' Compensation Act was amended in 1984 by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, and retitled the Longshore and Harbor Workers' Compensation Act (33 U.S.C. (& Supp. IV) 901 *et seq.*).

from claimant's fee award compensation for that percentage of hours, which he estimated at 40%, that had been expended on the unsuccessful Section 49 claim.

3. On claimant's appeal, the Department of Labor's Benefits Review Board ruled (Pet. App. 15a-16a) that the ALJ had erred in reducing the fee award to reflect claimant's lack of success on the retaliation claim. The Board held (*ibid.*) that it is improper to "limit the fee only to work performed on issues on which claimant prevails" and noted (*id.* at 16a) that "[t]he Board has allowed an attorney's fee for work performed on an unsuccessful discrimination claim where claimant has prevailed in obtaining disability compensation." The Board concluded that "the fact that claimant did not prevail on the Section 49 claim in the instant case does not preclude a fee for work on that issue" and the Board consequently modified the award by eliminating the 40% reduction (*ibid.*).

4. Upon review, the court of appeals concluded that the Board erred in failing to differentiate between attorney's fees for work performed on unsuccessful issues and work performed on unsuccessful claims, and in adopting a presumption that the separate benefits and discrimination claims were sufficiently intertwined to award fees on both (Pet. App. 5a, 9a). The court thus denied enforcement of the Board's order and remanded with instructions to accept the findings of the ALJ (*id.* at 2a).

Noting (Pet. App. 6a) that it was "the first appellate court to reach the issue" whether a successful benefits claim and unsuccessful discrimination claim are sufficiently related that attorney's fees must be awarded under Section 28(a) of the LHWCA, 33 U.S.C. 928(a), for work performed on both claims, the court concluded that the legislative history of the LHWCA indicates that the amount of fees should be related to the claimant's success in increasing his compensation under the Act (Pet. App.

6a, citing H.R. Rep. 92-1441, 92d Cong., 2d Sess. [9] (1972)). Given that indication of intent, the Court declined to treat petitioner's partial success under the LHWCA any differently from the way similar success is treated under statutes authorizing fees to "prevailing parties." It thus found (Pet. App. 7a) appropriate the standards enunciated by this Court in *Hensley* v. *Eckerhart,* 461 U.S. 424, 435 (1983) which require that no fees be awarded for work done on unsuccessful claims that are unrelated to other claims successfully litigated in the same lawsuit. Disclaiming "any hard and fast rule with respect to jointly filed claims of disability and retaliatory discharge under the [LHWCA]" (Pet. App. 9a), the court concluded (*id.* at 10a) that the ALJ had properly "consider[ed] the particular claims in this case, and found them separate and distinct," and that the record supported the ALJ's findings and his correspondent reduction of the fee award by 40% (*id.* at 10a-11a). Accordingly, the court ruled (*ibid.*) that the ALJ had acted within his broad discretion as the fact-finder most familiar with the circumstances of the trial.

5. The court of appeals' holding does not conflict with any decision of this Court or any other court of appeals. Indeed, petitioner acknowledges that the court of appeals' decision resolves an "issue of first impression" (Pet. i) concerning attorney's fees under the LHWCA and that there is a "lack of case law at the appellate level" (Pet. 5) on the issue. Accordingly, review is unnecessary to resolve a conflict in the circuits.

Moreover, the court of appeals' decision is correct. Contrary to petitioner's contentions, the court of appeals did not hold that it is "proper under the [LHWCA] to limit attorney's fees and expenses only to work performed on *issues* in which the claimant prevails" (Pet. 4 (emphasis added)). Rather, as the court of appeals explained (Pet.

App. 5a, 9a), this case presents the question whether it is proper under the LHWCA to limit attorney's fees to compensation for "readily severable" *claims* on which a claimant prevails.

Section 28(a) of the LHWCA authorizes an award of fees to persons who "have utilized the services of an attorney at law in the successful prosecution of his claim * * *." 33 U.S.C. 928(a). The statutory language thus appears to link the availability of a fee award to success in prosecuting a particular claim. Also, as the court below recognized (Pet. App. 6a), the legislative history of Section 28(a) demonstrates that "[a]ttorneys fees may only be awarded against the employer where the claimant succeeds," and only to the extent that "the compensation payable [under the Act] is increased as the result of the litigation." H.R. Rep. 92-1441, 92d Cong., 2d Sess. 9 (1972). By this measure, petitioner was plainly not successful on his retaliation claim and not entitled to fees for the claim, since he lost on the merits and did not increase his compensation under the Act by virtue of litigating the claim.

Given Congress's evident desire that fees awarded correspond to success obtained, the lower court properly held (Pet. App. 7a) that there is no reason petitioner's LHWCA fee request should be treated differently from those of partially successful plaintiffs under statutes authorizing awards to "prevailing parties." According to this Court in *Hensley* v. *Eckerhart,* 461 U.S. at 440, to the extent that claims made by a prevailing party in a single lawsuit are unrelated, fees should only be awarded to compensate work on those claims that were successful. Further, in making the determination as to whether claims are sufficiently distinct to be separable for fee award purposes, the trier of fact has discretion appropriate to its "superior understanding of the litigation and the desirability of

avoiding frequent appellate review of what essentially are factual matters" (*id.* at 437). The court of appeals appropriately applied these standards to the facts of this case.[2] As it found (Pet. App. 10a), the ALJ did consider the particular claims in this case, and found them separate and distinct. The record supports that finding. The claim for disability centered on whether petitioner was disabled as the result of the October 1980 injury that occurred during his employment with General Dynamics. Pet. App. 10a, 37a-38a, 40a. On the other hand, petitioner's Section 49 discrimination claim focused on whether General Dynamics discharged him for retaliatory reasons in February, 1982, rather than for his violation of work rules as General Dynamics asserted (*ibid.*). On these facts, the court of appeals correctly concluded that the ALJ was within his discretion when he excluded fees for the unsuccessful discrimination claim.[3]

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[2] As the court of appeals explains (Pet. App. 5a-6a), the Board erred in reading its own precedents to stand for a different approach according to which claims of disability and discrimination are *presumptively* interrelated. The earlier Board cases, *Nooner* v. *National Steel & Shipbuilding Co.*, 19 Ben. Rev. Bd. Serv. (MB) 43 (1986), and *Battle* v. *A.J. Ellis Construction Co.*, 16 Ben. Rev. Bd. Serv. (MB) 329 (1984), in which the Board affirmed ALJ fee awards, stand only for the proposition that an ALJ should not be *precluded* from granting fees on an unsuccessful claim where that claim is intertwined with a successful claim.

[3] Even if petitioner's separate claims had been related within the meaning of *Hensley*, 461 U.S. at 435-436, 440, in that they shared a "common core of facts or [were] based on related legal theories," it would nonetheless be appropriate under *Hensley* to reduce petitioner's fee award in light of his limited overall success in the litigation. Cf. *Avila* v. *Coca-Cola Co.*, 849 F.2d 511, 514-515 (11th Cir. 1988) (plaintiff's successful retaliation and unsuccessful national origin discrimination claims related, but plaintiff's attorney's fee award should be reduced because of plaintiff's limited success in lawsuit).

Finally, petitioner asserts that the decision below will discourage counsel from litigating LHWCA claims. But the fee award provision is designed only to compensate a claimant for attorney's fees incurred in the "successful prosecution of his claim * * * " (33 U.S.C. 928(a)). As long as a claimant's counsel receives compensation for work in furtherance of a successful prosecution of a claim, the congressional purpose underlying Section 928(a) is achieved. The court of appeals' holding does not transgress that principle.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—241-699/60767